Supreme Court, U.S.
FILED

No. 99 957 DEC 1 1999

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IN THE

SUPREME COURT OF THE UNITED STATES

DENISE CHAMBLEY, and JANE GAULDING
and WILLENE HAMMOCK, as Co-Executrixes of the
Estate of EUGENE BARTON ELLIOTT

Petitioners

v.

PIKE COUNTY, GEORGIA, ROBERT CURTIS,
THOMAS LACEY, W. A. OLIVER, JAMES LESTER,
MONROE PILKENTON, PHILLIP HANSON, JAKE GARNER,
JOHN ATKINS, individually, and in their official capacity
as Pike County Commissioners

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. What character must private real property take on to have its civil seizure implicate the individual protections against unreasonable seizures by the government set forth in the Fourth Amendment?

II. Whether the judicially interpreted privacy concerns which serve as the cornerstone of this Court's Fourth Amendment "search" analyses dictate Fourth Amendment "seizure" inquiries, and the Court's parallel concern over unreasonable governmental intrusion which meaningfully interferes with a person's possessory interest in that property?

III. Whether this Court should adopt the hard and fast rule that the Fourth Amendment is always implicated when the government seizes or takes for private use, real property on which private residences sit?

IV. Whether governmental taking/deprivation/seizure of private property for private use removes such action from the purview of the Fifth Amendment and can place it within the realm of the Substantive Due Process aspect of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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Petitioners, Denise Chambley, and Jane Gaulding and Willene Hammock, as Co-Executrixes of the Estate of Eugene Barton Elliott, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit in *Denise Chambley; Jane Gaulding, et al,. v. Pike County, Georgia; Robert Curtis, et al.*, No. 98-8522 (11th Cir. 1999) is not reported, but is attached in its entirety in Appendix A. The Order of the district court in *Denise Chambley and Jane Gaulding and Willene Hammock, as Co-Executrixes of the Estate of Eugene Barton Elliot v. Pike County, Georgia, Robert Curtis, Thomas Laey, W.A. Oliver, James Lester, Monroe Pilkenton, Phillip Hanson, Jake Garner, John Atkins, Individually, and in their Official Capacity as Pike County Commissioners,* Civ. No. 3:97-CV-36-JTC (N.D. Ga. 1998) is not published, but is reproduced in its entirety at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on July 9, 1999. The Court of Appeals denied a timely filed petition for rehearing on September 2, 1999, the order being attached at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Unites States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law."

Federal Rule of Civil Procedure 12(b)(6) provides in relevant part:

> Every defense, in law or fact to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

This case involves the interplay between the Fourth, Fifth, and Fourteenth Amendments within the context of a governmental taking/seizure of private property for private use. To fully appreciate the significance of the issues presented by this case, it is essential to consider its factual and procedural background.

I. Statement of the Facts

As the District Court and Eleventh Circuit were bound to do, the courts accepted the allegations of Petitioner's Complaint and Amended Complaint as true in resolving Respondent's 12(b)(6) motion. The Petitioners, hereinafter the "Elliott family" live on and own land in Pike County, Georgia. The Elliott property is located between the Curtis family property on one side and a highway on the other.

In the early 1900's, the Elliott family allowed Robert Curtis' ancestors to use a portion of their property as a path to access the main road and other agricultural properties. As modes of transportation improved over time, the path came to be used as a driveway by the Curtis

family. The driveway is about one-eighth of a mile long and is generally known as Curtis Road.

The use of Curtis Road has been limited for over sixty years to ingress and egress from the Curtis Property. The Elliott family allowed the Curtis family license to use the road, yet never granted a formal written easement.

In 1986, Defendant Robert Curtis became a Commissioner of the Pike County Board of Commissioners. From time to time thereafter, Defendant Curtis would solicit County maintenance vehicles to come onto the Elliott property, unauthorized, to "scrape" the road. Elliott family members told County personnel to cease their activities on numerous occasions, as they had no right to be on the Elliott property. The County personnel would leave upon request.

Somewhere around 1986-1987, Curtis Road mysteriously appeared on the "County Map." No formal action was taken to approve this addition. The Elliot family was never notified that the road had been placed on the map.

In 1996, Defendant Commissioners decided to, and did, pave Curtis Road using County funds. The County did not ask the Elliott family for permission, nor did they notify the family of their intentions. As the Board considered that the road had been on the County Map for ten (10) years, it apparently did not believe that fundamental notions of fairness and due process were necessary.

II. Course of Proceedings and Disposition in the Courts Below.

Petitioners filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983 in the United States District Court of the Northern District of Georgia, Newnan Division on March 18, 1997. The Complaint alleged state and federal claims, including violations of Fourth Amendment protections against unreasonable seizure of property and Fourteenth Amendment Substantive Due Process. Appellees moved to dismiss the Complaint on May 30, 1997.

By Order dated March 25, 1998, the District Court granted Appellees' Motion to Dismiss. In rulings relevant to this petition, the District Court took two separate routes in holding no Fourth Amendment Seizure occurred here.

First, the Court concluded that the Fourth Amendment did not protect the Elliotts against seizures of real property, as open land was not strictly a person, house, paper, or effect. Taking an extreme textualist approach, the District Court distinguished this Court's explicit recognition of the Fourth Amendment applicability to civil seizures in Soldal v. Cook County, 506 U.S. 56, 62, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992), reasoned that the only basis for that application was the fact that the property seized in Soldol was a mobile home, which fell within the scope of a "house." In parallel reasoning, the District Court alternatively theorized that the Fourth Amendment did not protect Petitioners' interests here, likening Curtis Road to an "open field."

Having no reasonable expectation of privacy, therefore, the District Court foreclosed the Fourth Amendment relief.

The District Court also dismissed the Petitioners' claim of deprivation of substantive due process on the grounds that their claims could only be recognized under an explicit textual constitutional provision (the Fifth Amendment), and recognition of a substantive due process deprivation in this case would create "a new constitutional right."

The Elliotts filed their Notice of Appeal on April 23, 1998. By Decision dated July 9, 1999, the Eleventh Circuit affirmed, without opinion, the Order of the District Court. (App. A). The Elliotts filed a Suggestion of Rehearing En Banc on July 30, 1999, which the Eleventh Circuit denied on September 2, 1999. (App. C).

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted to Reach the Hard and Fast Rule of First Impression that the Fourth Amendment is Always Implicated When the Government Seizes, for Private Use, Real Property Connected to Lands on Which the Owners Live; Concomitantly, the Petition Should Be Granted to Clarify that the Privacy Concerns of Fourth Amendment "Search" Jurisprudence do not Dictate Fourth Amendment "Seizure" Analysis, and the Court's Concerns over Unreasonable Governmental Interference with Individuals' Possessory Interests in Their Property.

Judging from the civil seizure cases that have made their way to this Court, it appears the concept of placing the Fourth Amendment analysis grid over what would otherwise seem on the surface to be fodder for civil due process-type processing, is an uncomfortable task for the federal judiciary. Perhaps this is so because courts most often deal with the Fourth Amendment in terms of its offspring - the exclusionary rule; or perhaps it is so because even in the civil litigation context, (excessive force, malicious prosecution and illegal search cases), there is almost always some law enforcement presence involved. Either way, as uncomfortable a task as it may seem, this Court has made clear that seizure of real property falls within the protection of the Fourth

Amendment. See United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) and Soldal v. Cook County, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992). This case does, too.

So disconcerting was this ideology to the district court that it delineated three (3) separate approaches as to why this matter case anything but a Fourth Amendment case: Textually, the court believed the road was not a person, house, paper, or effect; confusingly, the court thought it property to analyze the case using traditional "search" analysis, likening the road to an "open field"; and, conveniently, the court simply could not fathom that what it believed implicated one constitutional provision, could possibly draw upon another. Following statements of basic Fourth Amendment principles, each of these approaches will be dealt with in turn. [1]

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Based upon this Court's own definitions of "searches" and "seizures," differing levels of protection appear warranted depending upon the nature of the intrusion. As this Court has defined the terms, "a 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when

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[1] Again, as the Eleventh Circuit affirmed without opinion, it is the District Court's analysis with is offered for constitutional scrutiny.

there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). This Court reaffirmed that definition in Soldal v. Cook County, and rejected the notion that the Fourth Amendment only applies in the law enforcement arena. See Soldal v. Cook County 506 U.S. 56, 62, 67, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992).

Clinging to textualist principles, the district court believed this case was not Fourth Amendment worthy because the path on the Elliott family's property was not a person, house, paper or effect. Petitioners concede that, if anything, the path would probably have to fall within the meaning of the word "house" to gain Fourth Amendment protection.[2] Fortunately, this task has already been done for them by this Court.

In the United States v. James Daniel Good Real Property, civil seizure case, this Court succinctly held the Fourth Amendment's reasonable seizure requirement applies "to real property in general, not simply to residences." United States v. James Daniel Good Real Property, 510 U.S. 43, 62, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). Moreover, not only was the residence seized in that case, but the four acres that adjoined the residence were likewise seized. See id. at 46. All told, the law on the point is completely with the Petitioners.[3]

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[2] Petitioners do not, however, waive any position they may have that the path could be construed as an "effect."

[3] With all the "search" cases involving places of business on the books, it is unclear how a textualist approach could even be entertained.

The danger here, of course, is the temptation of lower courts to fall back upon the doctrines with which they are all familiar. For instance, and as will be discussed below, the "open fields" doctrine of Fourth Amendment "search" analysis. This temptation and confusion can be healed in one fell swoop here - a hard a fast rule that the Fourth Amendment is always implicated when the government seizes real property connected to, or on lands on which, the owners live.

One reason a hard and fast rule is warranted is to help delineate the differing interests society has in protection from unreasonable "seizures" as opposed to unreasonable "searches." To explain, let us turn to the district court's second approach, in which it chose to delve into Fourth Amendment "search" analysis as a means to dismissing this case.

The district court improperly analyzed the Fourth Amendment question in this case under a search analysis rather than a "seizure" one. The court likened the roadway on the Elliott's property to an "open field," which it considered outside the scope of Fourth Amendment protections. In doing so, the court cited to Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1994) which is the seminal "open fields" case. In Oliver, police officers trespassed upon private property and found marijuana growing in a secluded area. This Court reasoned that because the marijuana was growing in open fields, which could be seen from airplanes, the property owner had no reasonable expectation of privacy over the area.

This Court has clarified that "our cases unmistakedly hold that the [Fourth] Amendment protects property as well as privacy." Soldal, 506 U.S. at 62. Construing certain Fourth Amendment "seizure" cases, the Supreme Court held that "although lacking a privacy component, the property rights in [these] instances nonetheless were not disregarded, but rather were afforded Fourth Amendment protection." Soldal, 506 U.S. at 63-64. In fact, on this very issue, this Court has been unequivocal, holding that the protections of the Fourth Amendment "often have nothing to do with privacy at all." Katz v. United States, 389 U.S. 347, 350, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (emphasis added).

This Court's cases also "hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." Soldal, 506 U.S. at 68. All told, the hard and fast rules suggested above would help the Circuits in their understanding of the differing principles at work in the Fourth Amendment realm. It would also fit analytically squarely in place with yet another constitutional principle, which is that subject to only a few specific exceptions not relevant here, any government seizure of private property conducted outside the judicial process, without prior authorization based on probable cause, is per se unreasonable under the Fourth Amendment. See Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

This hard and fast rule would also help bolster yet another of this Court's recent espousements - that one can violate more than one

constitutional provision with a single act. This concept appears to be yet another that is distasteful to clean constitutional analysis, as is apparent by the district court's stated troubles.

The Eleventh Circuit affirmed the district court's erroneous ruling that recognition of a Fourth Amendment violation in a seizure such as this would render the Fifth Amendment obsolete. As an analytical out, the court took a page from Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). Albright, with which we are all familiar, follows a long line of cases involving the Substantive Due Process component of the Fourteenth Amendment and this Court's displeasure at litigants constantly attempting to expand upon that clause where other specific amendments (or state tort law) spell out the actual relief sought. Of course, Albright was concerned only with the substantive component of the Due Process Clause of the Fourteenth Amendment, because litigants nationwide are always trying to fit basic state law torts under the catch-all provisions of that Amendment.

Were this Court to adopt the hard and fast rule suggested, squeamish lower courts would know once and for all that this Court means what it says. This Court has made clear that more that one constitutional violation may occur at a time, and that fact does not render constitutional provisions any less meaningful. As the Court stated in Soldol, "Certain wrongs affect more than one single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the

habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each Constitutional provision in turn." Soldol, 506 U.S. at 70.

After quoting this passage in Soldol, this Court further elucidated the compatibility of multiple constitutional provisions in United States v. James Daniel Good Real Property, 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993). The Court reasoned that, "here, as in Soldal, the seizure of property implicates 'two explicit textual sources of constitutional protection,' the Fourth Amendment and the Fifth." Id., 510 U.S. at 50. The proper questions is not which Amendment controls, but whether either Amendment is violated. See id.

Not unlike other circuits, the district court was very concerned that if the facts of the case at bar implicated the Fourth Amendment, then "every Fifth Amendment takings claim would also invoke the Fourth Amendment." This Honorable Court has already rejected this idea. Soldal involved consideration of both a Fourth and Fourteenth Amendment claim[4]; and James Daniel Good Real Property contained both Fourth and Fifth Amendment claims.

By affirming the District Court's decision that the government's theft of private land for private purposes did not constitute seizure under the Fourth Amendment, the Eleventh Circuit has gone well astray from basic constitutional law and principles. The Circuits would greatly

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[4] Actually, because the United States Supreme Court in Soldal resolved the Fourth Amendment issue in favor of the plaintiffs, it chose not to reach the Fourteenth Amendment Substantive Due Process claim .

benefit from a decision by this Court on all these Fourth Amendment questions.

II. The Petition Should Be Granted on an Issue of First Impression to Answer Affirmatively that Where the Government Takes Private Property for Private Use, that Such Action is Outside the Purview of the Fifth Amendment, and can be Characterized as a Naked Deprivation of Property Without Substantive Due Process of Law.

This Court has long jealously guarded the gate to relief via substantive due process, and perhaps rightfully so. This case, however, is a classic naked deprivation of property by the government, so wrong at its inception that the traditional route of the Fifth Amendment is unavailable. In short, this Court finally has before it a viable substantive due process claim.

At the outset, Petitioner's initial proposition is very simple and requires no case citations. The Fifth Amendment prohibits taking of private property for public use, without just compensation. The use here is private. As alleged in the Complaint, the path is used only for ingress and egress to Robert Curtis' property. As the taking was for a private use, no Fifth Amendment claim exists, and so Petitioner's claim turned to Substantive Due Process.

Unfortunately, clinging to the notion that where the Constitution offers protection in an explicit textual provision that Substantive Due Process is thus unavailable, the district court concluded that the Elliotts failed to state a Substantive Due Process claim here. The district court relied on Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). The concern of this Court in Albright, however, was not the idea that two Constitutional provisions could not be simultaneously violated. Rather, this Court continued its course of limiting the substantive component of the Due Process Clause where claims should otherwise be brought under state law or, where an explicit rule is to be found elsewhere in the Constitution.

As recognized by this Supreme Court, and as suggested by a plurality of the Eleventh Circuit in a decision prior to the one *sub judice*, deprivation of life, liberty, or property can be attacked as a violation of Substantive Due Process under certain circumstances. Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); Burch v. Apalachee Community Mental Health Services, 840 F.2d 797, 803 (1988) (Johnson, Circuit Judge, specially concurring in which Vance, Kravitch, and Hatchett, Circuit Judges, and Tuttle, Senior Circuit Judge joined). In Burch, a plurality of the Eleventh Circuit confirmed that the plaintiff had stated a Substantive Due Process violation for a deprivation of liberty. In Burch, an involuntary commitment case, the plurality reasoned that the governmental action of which the plaintiff there complained belongs to

the "species of conduct that is unjustified because it is, in and of itself, antithetical to fundamental notions of due process." Id. at 804.

The Burch decision was appealed to this Court in Zinermon. Construing Zinermon, as well as other Seventh Circuit law, the Seventh Circuit Court of Appeals' opinion in Soldal (on issues not reached by the United States Supreme Court on appeal) held:

> As a matter of federal constitutional law, if the government takes private property for a public use it need only pay the owner the fair market value of the property. But if it takes private property for a private use - say it takes the Soldals' trailer and gives it to Mrs. Hale because she is a personal friend of powerful public officials - then the taking is not privileged by the Takings Clause of the Fifth Amendment, viewed as a grant of power to the government to take a person's property upon payment of its fair market value ("just compensation"). It is then a naked deprivation of property, and the owner is entitled to get it back or, if that is infeasible, to obtain full common law damages. An action so conceived is a plausible, though not clearly proper, invocation of substantive due process, . . .

Soldal, 923 F.2d 1241, 1248 (emphasis added).

Although Petitioners do not necessarily believe the Substantive Due Process clause to be so limited, the allegations of their Complaint

contain an allegation that the County took their property for the sole purpose of improving property used only for ingress and egress to Robert Curtis' property. That would be private use, and at a minimum, discovery on the issue would be proper.

Rendering an opinion on the issue here would certainly go a long way toward explaining how and which claims can be characterized as ones properly brought under substantive due process. Plenty of history would back the decision.

"Property" undeniably falls within the category of interests and relations protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Bley and Axelrad, The Search for Constitutionally Protected "Property" in Land-Use Law, 29 THE URBAN LAWYER 251 (1997); see also Ogden v. Sanders, 25 U.S. 213, 332, 334, 344-48, 6 L. Ed. 606 (1827) (Marshall, C.J., dissenting) (principal purpose of the Constitution is protection of property rights); Fuentes v. Shelvins, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (any significant taking of property by the State falls within the purview of the Due Process Clause). While the Fifth Amendment prohibits uncompensated takings, the Fourteenth Amendment constrains local governments from depriving any person of "property" without due process of law.

Blackstone argued that occupancy and use of the land gave permanent rights in the substance of the earth itself. See 2 William Blackstone, Commentaries on the Laws of England (1769), *8. As

society evolved, it recognized that a permanent right of property in the land itself was a rational and efficient means to orderly social relations and avoidance of conflicts. Id. at *11. Hence, "property rights in the ownership of land is a cornerstone in the evolution of English law" Bley and Axelrad, supra at 251 (emphasis added). It was thus incorporated to the American legal system, in part, through the Federal Constitution.

Moreover, fundamentally speaking, this is hot a "procedural" due process case. The actions here were antithetical to fundamental notions of due process. The secret placing of the path on the County Map as a "County Road" in 1986 was wrong in its inception and afforded absolutely no opportunity for due process. The County simply declared the path its own, and ten (10) years later paved it, without ever condemning it or affording due process. Acts wrong in their inception implicate the substantive protections of the Fourteenth Amendment.

VI. CONCLUSION

Several badly needed clarifications reside within this case. The interplay between the Fourth Amendment and those Amendments for which land-type disputes are traditionally reserved, is a difficult one without clear guidance - to say the least.

Granting certiorari here would give clear guidance to lower courts grappling with the tensions of competing constitutional doctrines.

WHEREFORE, Petitioners respectfully request this Court inquire into and grant this petition for writ of certiorari.

This 29 day of November, 1999.

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APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FILED JULY 9, 1999

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8522

D.C. Docket No. 3:97-CV-36-JTC

Filed July 9, 1999

DENISE CHAMBLEY;
JANE GAULDING, et al.,

Plaintiffs-Appellants,

versus

PIKE COUNTY, GEORGIA;
ROBERT CURTIS, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(July 9, 1999)

Before CARNES, Circuit Judge, HILL, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

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*Honorable William H. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

OPINION OF DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED MARCH 25, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

DENISE CHAMBLEY, JANE GAULDING, and WILLENE HAMMOCK, as co-Executrixes of the Estate of Eugene Barton Elliott,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 3:97-CV-36-JTC
PIKE COUNTY, GEORGIA, ROBERT CURTIS, THOMAS LACEY, W.A. OLIVER, JAMES W. LESTER, MONROE PILKENTON, PHILIP HANSON, JAKE GARNER, and JOHN ATKINS individually and in their official capacity as Pike County Commissioners,	)	
Defendants.	)	

ORDER

Filed March 25, 1998

This matter is presently before the Court on Defendants' Motion to Dismiss [#4-1]; Plaintiffs' Motion for Leave to Amend Complaint [#5-1]; Plaintiffs' Motion for Leave to File Amended Response Brief in Opposition to Defendants' Motion to Dismiss Correct Clerical Errors [#7-1]; and Plaintiffs' Motion for Leave to File Supplemental Brief in Opposition to Defendants' Motion to Dismiss [#10-1].

I. BACKGROUND

Plaintiffs raise federal and state law claims against Defendants as a result of a dispute over a piece of real property. Plaintiffs describe the property as one-eighth of a mile long and having the name "Curtis Road." The property is located in Pike County and the individually named Defendants are all present or former duly elected commissioners of Pike County. Plaintiffs claim they own the property and granted the family of Robert Curtis a license to use it as a pathway. The property leads to form a highway to the Curtis property and has been used for over sixty years to ingress and egress to the Curtis property. Over the years the path became more of a dirt road. Plaintiffs complain of the County's decision to treat the property as a County road, and to pave and otherwise improve it.

II. PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

Rule 15(a) encourages courts to freely grant amendments. In Forman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court announced how Fed. R. Civ. P. 15(a) was to be applied: "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." Thus, amendments to proceedings should be liberally allowed under Rule 15, unless a party can demonstrate that the amendments are unduly prejudicial, futile,

will cause undue delay or that movants have acted in bad faith. See Forman, 371 U.S. at 182; Pan Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546 (5th Cir. 1980).

Although the decision to grant leave to amend is within the court's discretion, the policy of Rule 15(a) is to liberally allow amendments in order to reach the merits of claims. Shipner v. Eastern Air Lines, 868 F.2d 401, 406-07 (11th Cir. 1989). As a result, a district court's discretion to deny amendments is limited. Id. at 407. Absent a substantial reason to deny leave to amend, the district court's discretion is not sufficiently broad to permit denial. Id.

Plaintiffs seek to amend three paragraphs of the Complaint, including a deletion of Plaintiffs' allegations that Defendants' actions constituted a taking of Plaintiffs' property without just compensation and an inverse condemnation. Plaintiffs believe these amendments clarify the Complaint, and dispel the notion that Plaintiffs are bringing a claim under the Fifth Amendment to the United States Constitution. Defendants do not oppose Plaintiffs' Motion. Plaintiffs' Motion to Amend Complaint [#5-1] is hereby **GRANTED**.

III. DEFENDANTS' MOTION TO DISMISS

Defendants argue that Plaintiffs have failed to state a claim upon which relief may be granted.

A. Legal Standard

The purpose of a Rule 12(b)(6) motion is to determine whether the Plaintiffs' complaint adequately states a claim for relief. A motion to dismiss concerns only the complaint's legal sufficiency and is not a procedure for resolving factual questions or for addressing the merits of the case. See 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 1356 (2d Ed. 1990). Consequently, the Court's inquiry is limited to the contents of the complaint. GSW, Inc. v. Long County, Ga., 999 F.2d 1508, 1510 (11th Cir. 1993).

A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted. Wright & Miller, § 357 at 321. The Supreme Court has determined that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts" which would entitle plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the complaint's allegations must be accepted as true and construed in the light most favorable to the plaintiff. See Powell v. United States, 945 F.2d 374, 375 (11th Cir. 1991).

B. Fifth Amendment Takings Claim

Defendants argue that to the extent Plaintiffs seek relief under the Fifth Amendment, their takings claims is not yet ripe, as

Plaintiffs have not yet exhausted their remedies. For example, Defendants observe that Plaintiffs have a potential state inverse condemnation claim that Plaintiffs have yet to resolve.

Plaintiffs believe the Complaint could not state a Fifth Amendment claim, because, according to Plaintiffs, the Fifth Amendment applies only to the federal government, and not to state actors. Plaintiffs have misread the law on this point. The Fifth Amendment takings clause has been made applicable to the states through the due process clause of the Fourteenth Amendment. Charles J. Arndt, Inc. v. City of Birmingham, 748 F.2d 1486, 1490 (11th Cir. 1984); Webb's Fabulous Pharm., Inc. v. Beckwith, 449 U.S. 155, 160 (1980). In addition, the case Plaintiffs cite, Lyle v. Dodd, 857 F. Supp. 958 (N.D.Ga. 1994) (Carnes, J.), discusses only the due process clause of the Fifth Amendment, and not Fifth Amendment takings. 857 F. Supp. at 966.

Nevertheless, Plaintiffs specifically represent that they do not allege a Fifth Amendment claim, and they have amended the Complaint in an attempt to clarify the point. (Amended Resp. Brief in Opp'n to Defs.' Mot. to Dismiss ("Pls.' Resp.") at 4, 5-6.) Accordingly, as Plaintiffs have specifically disavowed making a Fifth Amendment claim, the Court need not further discuss this aspect of Defendants' Motion to Dismiss.

C. Fourteenth Amendment Procedural Due Process Claim

Defendants argue that because Georgia law provides Plaintiffs with all the process to which they are due, Plaintiffs' procedural due process claim must fail. See Boatman v. Town of Oakland, Fla., 76 F.3d 341, 346 (11th Cir. 1996); McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994). Plaintiffs' Response does not argue that their procedural due process claim should survive Defendants' Motion. Indeed, Plaintiffs argue that an adequate remedy exists under state law. (Pls.' Resp. at 4-5). Accordingly, the Court finds that Plaintiffs' claim for denial of procedural due process does not state a claim for relief.

D. Fourteenth Amendment Substantive Due Process Claim

The substantive component of the Due Process Clause protects "fundamental rights." McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (citing Palko v. Connecticut, 302 U.S. 319 (1937)). Fundamental rights include most of the rights enumerated in the Bill of Rights and certain unenumerated rights, such as the right of privacy. McKinney, 20 F.3d at 1556. Both the Supreme Court and the Eleventh Circuit have cautioned against expanding the reach of substantive due process. Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992); McKinney, 20 F.3d at 1556.

Defendants submit that Plaintiff cannot prosecute a substantive due process claim on the facts alleged in the Complaint. The Court agrees with the Defendants that, as Plaintiffs themselves recognize, where the Constitution offers a protection in an explicit textual provision, substantive due process is unavailable. Albright v. Oliver, 510 U.S. 266, 273-75 (1994); Pls.' Resp. at 11-12. In the instant case, the Constitution explicitly offers relief through the Fifth Amendment takings clause, applied to the states through the Fourteenth Amendment. Thus, the Court concludes that no substantive due process claim may lie. See Bickerstaff Clay Prods. Co. v. Harris County, Ga., 89 F.3d 1481, 1489-90 (11th Cir. 1996).

Plaintiffs argue that they "do not bring a Fifth Amendment claim, they do not believe they have one, and have effectively withdrawn any assertions that would lead to the suggestion that a Fifth Amendment claim lies here." (Pls.' Resp. at 7). However, Plaintiffs' decision whether or not to bring a claim cannot result in the creation of a new constitutional right. Regardless of how Plaintiffs choose to frame their arguments, Fourteenth Amendment substantive due process provides them no claim for relief outside of the application of the Fifth Amendment. Plaintiffs do not cite a single authority where substantive due process was successfully applied in this context.

E. Fourth Amendment Claim

Plaintiffs assert that Pike County seized Curtis Road in violation of Plaintiffs' Fourth Amendment Rights.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Defendants argue that the language of the Amendment, protecting only against seizures of "persons, houses, papers and effects," by its own terms does not apply to Plaintiffs' allegations regarding the alleged seizure of open land. The Court agrees.

Plaintiffs rely on Soldal v. Cook County, Ill., 506 U.S. 56 (1992), in support of their claim. In Soldal, the Supreme Court held that allegations that deputy sheriffs dispossessed the owners of a mobile home by physically tearing it from its foundation and towing it to another lot sufficiently alleged a seizure within the meaning of the Fourth Amendment. 506 U.S. at 57-60, 72. According to Plaintiffs, Soldal stands for the proposition that the Fourth Amendment's protections apply to seizures of pure property interests, even outside of the law enforcement context.

Soldal, however, is distinguishable on its facts from the allegations in the instant case. In Soldal, the Plaintiffs' home was physically taken and moved to a different location. Here, Plaintiffs' allegations have nothing to do with their home. Instead, Plaintiffs allege that a tract of open property was seized when the County began improvements, treating it as a County road. In Soldal, the Supreme Court specifically based its ruling on the case involving a house, which, like a person's effects, is explicitly protected by the language of the Amendment. 506 U.S. at 62 n.7. While holding that the Fourteenth Amendment protects property as well as privacy, 506 U.S. at 62, the Supreme Court recognized that "the Amendment does not protect possessory interests in all kinds of property." 506. U.S. At 62 n.7. The Supreme Court distinguished property explicitly described in the amendment from property which is not, citing Oliver v. United States, 466 U.S. 170, 176-77 (1984). 506 U.S. at 62 n.7. In Oliver, the Court declined to apply the Fourth Amendment's protections to open fields, distinguishing such tracts of land from "houses" or "effects" for which protection is provided. 466 U.S. at 176-77. Furthermore, Plaintiffs' theory proves too much. If a municipality's taking of land were a seizure protected by the Fourth Amendment, then every Fifth Amendment takings claim would also invoke the Fourth Amendment. The Court refuses to adopt this

reading, which would relegate the Fifth Amendment takings clause, and its exhaustion requirement, to mere surplusage.

Defendants' Motion to Dismiss Plaintiffs' Fourth Amendment claim is hereby **GRANTED**.

F. State Law Claims

Plaintiffs also seek relief based on state claims under Georgia law. However, Defendants' Motion to Dismiss Plaintiffs' federal claims has been granted, and the Court declines to exercise its supplemental jurisdiction over Plaintiffs' remaining state claims. See 28 U.S.C. § 1367.

IV. PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS TO CORRECT CLERICAL ERRORS

For good cause shown, Plaintiffs' unopposed Motion for Leave to File Amended Response Brief in Opposition to Defendants' Motion to Dismiss to Correct Clerical Errors [#7-1] is hereby **GRANTED**.

V. PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants filed their Motion to Dismiss on May 30, 1997, and Plaintiffs filed their initial Response on June 17, 1997. On June 23, 1997, Plaintiffs filed a Motion for Leave to File Amended Response Brief in Opposition to Defendants' Motion to Dismiss to

Correct Clerical Errors. This motion was unopposed and has been granted.

Two months after the deadline for filing a response had passed, on August 18, 1997, Plaintiffs then filed a second Motion for Leave to File Supplemental Brief in Opposition to Defendants' Motion to Dismiss. Unlike Plaintiffs' first supplement, the brief Plaintiffs now wish to offer is not mean to correct errors in the initial filings, but rather is intended to make further substantive arguments based on additional authority. Specifically, Plaintiffs wish to offer for the Court's consideration the case of United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

Defendants oppose Plaintiffs' Motion, observing that Plaintiffs offer no excuse why they failed to discover or cite this authority in previous responses to Defendants' Motion to Dismiss. The case is not a new, having been decided by the Supreme Court four years before Plaintiffs' filings. Additionally, this Motion in Plaintiffs' second request to supplement and comes well after the time to respond to Defendants' Motion to Dismiss had expired; the Local Rules make no accommodation for such a filing. The Court agrees with Defendants' analysis. Plaintiffs' Motion for Leave to File Supplemental Brief in Opposition to Defendants' Motion to Dismiss [#10-1] is hereby **DENIED**.

VI. SUMMARY

Plaintiffs' Motion to Amend Complaint [#5-1] is hereby **GRANTED**. Plaintiffs' Motion for Leave to File Amended Response Brief in Opposition to Defendants' Motion to Dismiss to Correct Clerical Errors [#7-1] is hereby **GRANTED**. Plaintiffs' Motion for Leave to File Supplemental Brief in Opposition to Defendants' Motion to Dismiss [#10-1] is hereby **DENIED**.

Defendants' Motion to Dismiss [#4-1] is hereby **GRANTED**. Plaintiffs' federal claims are hereby **DISMISSED**. Because the Court declines to exercise its supplemental jurisdiction in the absence of any remaining federal claim, Plaintiffs' state claims are hereby **DISMISSED WITHOUT PREJUDICE**. This action is hereby **DISMISSED**. The Clerk shall enter judgment accordingly.

SO ORDERED this 24th day of March, 1998.

/s/ Jack T. Camp
JACK T. CAMP
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING REHEARING

FILED SEPTEMBER 2, 1999

IN THE UNITED STATE COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8522

DENISE CHAMBLEY;
JANE GAULDING, et al.,

Plaintiffs-Appellants,

versus

PIKE COUNTY, GEORGIA;
ROBERT CURTIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

Filed September 2, 1999

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d _____)

Before: CARNES, Circuit Judge, HILL, Senor Circuit Judge, and HOEVELER*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX D

FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

FEDERAL RULE OF CIVIL PROCEDURE. 12 (b)(6)

U.S. CONST. AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleadings thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters

outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Supreme Court, U.S.
FILED
JAN 19 2000
CLERK

(2)

No. 99-957

In The

Supreme Court of the United States

DENISE CHAMBLEY; JANE GAULDING and WILLENE HAMMOCK, as Co-Executrixes of the Estate of EUGENE BARTON ELLIOTT,

Petitioners,

v.

PIKE COUNTY, GEORGIA; ROBERT CURTIS; THOMAS LACEY; W. A. OLIVER; JAMES LESTER; MONROE PILKENTON; PHILLIP HANSON; JAKE GARNER; and JOHN ATKINS, individually, and in their official capacities as Pike County Commissioners,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(I) Whether governmental takings of unimproved real property implicate the Fourth Amendment's seizure clause.

(II) Whether there is a need for independent substantive due process analysis, separate from the Fifth Amendment takings clause, of a claim that a governmental taking was not for a public purpose.

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OPINIONS AND JUDGMENT BELOW

As Appendix B to their Petition for Writ of Certiorari, Petitioners have provided the Order of the Honorable Jack T. Camp, Judge, United States District Court for the Northern District of Georgia (hereinafter referred to as the "district court"), entered March 25, 1998. Petitioners also included as Appendix A the July 9, 1999 *per curiam* affirmance of the United States Court of Appeals for the Eleventh Circuit (hereinafter referred to as the "Eleventh Circuit") in *Chambley, et al. v. Pike County, Georgia, et al.*, No. 98-8522 (11th Cir. July 9, 1999). Finally, Petitioners included as Appendix C the Eleventh Circuit's *per curiam* denial of Petitioners' Petition for Rehearing and Rehearing *En Banc*, filed September 2, 1999.

STATEMENT OF JURISDICTION

Respondents agree with Petitioners' representation that jurisdiction of this Court is conferred by reason of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree that this application for writ of certiorari involves the Fourth Amendment, Fifth Amendment and Fourteenth Amendment to the Constitution of the United States and Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF THE CASE

For purposes of Respondents' Rule 12(b)(6) motion to dismiss only, Respondents accepted the facts contained in Petitioners' complaint filed in this matter. At issue in this case is the ownership of a small strip of unimproved realty known as Curtis Road. Petitioners claim that Curtis Road represents an easement or a license given by the Elliott family to the Curtis family many, many years ago to serve as a driveway for the Curtis family. According to Petitioners, Curtis Road has never been a public road and has always been owned by one or more members of the Elliott family. Allegedly, sometime after 1986, Pike County began maintaining Curtis Road and, on occasion, Elliott family members interfered with this maintenance by telling county personnel to leave their property. Finally, in 1996, Pike County paved Curtis Road, allegedly against Petitioners' wishes.

In their complaint, Petitioners asserted two claims that are at issue in this appeal: first, Petitioners argued that the Fourth Amendment applies to the facts of the instant case and, second, they argued that Respondents' action of "taking" Curtis Road by the act of paving it violated their Fourteenth Amendment substantive due process rights. In making these claims, Petitioners affirmatively denied they were asserting any claim under the Fifth Amendment takings clause.

In lieu of filing an answer, Respondents filed a Rule 12(b)(6) Motion to Dismiss Petitioners' federal law claims. On March 25, 1998, the district court granted Respondents' motion, and on April 23, 1998, Petitioners filed their Notice of Appeal to the Eleventh Circuit. After oral

argument, the Eleventh Circuit affirmed without opinion the district court's order on July 9, 1999. Thereafter, the Eleventh Circuit denied Petitioners' Petition for Rehearing and Petition for Rehearing *En Banc*.

SUMMARY OF THE ARGUMENT

While Petitioners do not reference Rule 10 of this Court's Rules in their petition or even argue that this case merits review for any of the reasons set forth in Rule 10, it appears that review is sought pursuant to subsection (c). That is, Petitioners apparently contend that the Eleventh Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Specifically, Petitioners ask this Court to grant review of this case because it is allegedly a case of first impression and because Petitioners contend there is a need for certain "bright-line" rules in the context of eminent domain cases. Those "bright-line" rules, Petitioners suggest, are as follows: (1) the Fourth Amendment is always implicated when the government takes real property for a non-public use; (2) Fourth Amendment "search" jurisprudence is inapplicable to "seizure" analysis; and (3) the substantive due process clause of the Fourteenth Amendment, and not the Fifth Amendment's takings clause, governs a government's taking of real property for a non-public use. (Petition for Writ of Certiorari at 7, 14.) Petitioners' contentions are misguided.

Certiorari should not be granted because the questions Petitioners present are simply not appropriate for

this Court's review. More to the point, this is not a case of first impression, as this Court has considered many eminent domain cases, including those where the "public use" component of the Fifth Amendment was being challenged. Furthermore, the law is clear, as the district court and the Eleventh Circuit determined, that the Fourth Amendment is not applicable to governmental "takings" involving real property. Indeed, this Court has already reached the issue of the applicability of the Fifth Amendment takings clause to governmental takings cases, and declined to apply the more generalized notion of the Fourteenth Amendment's substantive due process clause. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Thus, there simply is no special and important reason for granting Petitioners' application for writ of certiorari.

ARGUMENT

Petitioners' petition to this Court fails to demonstrate any compelling reason for this Court to issue a writ of certiorari in this case. Rule 10 of this Court's Rules provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of

> appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), this Court discussed the dimensions of its discretionary review and why cases, such as this one, are not among those for which such review will be granted:

> [W]e have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, 28 U.S.C.A.

* * *

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 616 (citations omitted).

Petitioners herein essentially argue that the Eleventh Circuit was wrong when it decided that a taking of private land by a government does not implicate the Fourth Amendment and that the substantive due process clause of the Fourteenth Amendment is inapplicable because there is an explicit textual provision of the Constitution (i.e., the Fifth Amendment) that directly addresses harm allegedly suffered by Petitioners. Creatively, Petitioners claim that the facts of this case present a case of first impression for this Court, perhaps in an effort to avoid the stringent requirements of Rule 10. There is not a shred of validity to this contention, however, because every issue in this case has previously been addressed adversely to Petitioners, both by this Court, and by lower courts.

Not only is this a case of first impression, Petitioners' argument goes, but this Court must also take this case in order to develop bright-line rules regarding the Fourth

Amendment's applicability to governmental exercise of the power of eminent domain, and to declare that Fourth Amendment "search" jurisprudence is inapplicable to "seizure" cases. With reference to their Fourteenth Amendment substantive due process claim, Petitioners assert that this Court should grant their application for a writ of certiorari in order to declare that the substantive due process clause of the Fourteenth Amendment applies to a takings claim where the taking was for an alleged invalid public purpose. None of these arguments has any merit.

A. THE FOURTH AMENDMENT DOES NOT APPLY TO GOVERNMENTAL SEIZURES OF REAL PROPERTY

The district court determined that the Fourth Amendment simply does not apply under the facts alleged in Petitioners' complaint. Were the Fourth Amendment to apply, the court determined, "then every Fifth Amendment takings claim would also invoke the Fourth Amendment[ ] . . . [and] would relegate the Fifth Amendment takings clause, and its exhaustion requirement, to mere surplusage." (R1-12-8.) Contrary to Petitioners' argument, the district court was not making a *choice* between amendments. Rather, it was simply pointing out how illogical it would be to apply the Fourth Amendment to an allegation that a local government "took" a citizen's real property.

As suggested by the district court, the Framers of the Constitution specifically provided for cases such as this

one by drafting the Fifth Amendment. It is beyond contention that in a typical land use case, when a property owner alleges that the government has restricted his use of his property to such an extent that it has effectively "taken" that property without adequate compensation, the property owner's Fifth Amendment right has been implicated. *See Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985). Petitioners stand in no different position than plaintiffs in zoning cases. As such, Petitioners' rights, if any, flow from the Fifth Amendment. Petitioners, however, make no claim for violation of their Fifth Amendment rights. To the contrary, they affirmatively stated they were not making such a claim.

The specific language of the Fourth Amendment itself illustrates that it does not apply to the facts of the instant case. The Fourth Amendment provides:

> The right of the people to be secure in their **persons, houses, papers, and effects**, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. (Emphasis added.) Land, without more, is not a person, house, paper or effect.

In *Oliver v. United States*, 466 U.S. 170 (1984), this Court specifically addressed the reach of the Fourth Amendment to real property. In analyzing whether a search of an open field was proper, the Court looked to the explicit language of the Fourth Amendment, which "indicates with some precision the places and things encompassed by its protections." *Oliver*, 466 U.S. at 176.

Because the amendment does not refer to "open fields," this Court did not apply it to the case. Here, too, unimproved real estate is nowhere referred to in the Fourth Amendment.

This Court in *Oliver* considered "open fields" to be the same thing as "real property." In discussing the issue of open fields, this Court commented that open fields could not be considered to be "effects" because the term "effects" is "limited to personal, rather than **real property**." *Oliver*, 466 U.S. at 177 fn.7 (emphasis added). If real property is not protected from unreasonable *searches* under the express terms of the Fourth Amendment, neither is it protected from unreasonable *seizures*. Again, that is the province of the Fifth Amendment.

Furthermore, the Fourth Amendment does not provide an absolute protection against all searches and seizures. Rather, it protects only those searches and seizures undertaken without "probable cause, supported by Oath or affirmation and particularly describing the . . . things to be seized." If, as Petitioners suggest, the Fourth Amendment were to apply to the governmental power of eminent domain, then the amendment would require the government to secure a warrant, based on probable cause, describing the property to be taken. This is totally illogical. A government need not go through this procedure in order to obtain land from a citizen because "[t]he power of eminent domain is a fundamental and necessary attribute of sovereignty, superior to all private property rights." *Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) (citing *Georgia v. City of Chattanooga, Tenn.*, 264 U.S. 472, 480 (1924)). The only

constitutional requirements are that the taking be for a public purpose and that just compensation be given for the land seized. Those requirements, however, flow from the Fifth, and not the Fourth, Amendment. U.S. CONST. amend. V; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-41 (1984).

Petitioners' cited authority, *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992), is distinguishable on its facts. *Soldal* involved defendant law enforcement officers assisting with the process of "physically tearing" plaintiffs' *trailer home* out of the ground and moving it to another location. *Soldal*, 506 U.S. at 72. Because the Fourth Amendment specifically refers to "houses," this Court had little trouble holding that the Fourth Amendment was implicated. That is not the case here. Petitioners' home was not taken away, a small strip of real property allegedly was. The Fourth Amendment simply does not refer to seizures of real property, and there is no legal justification for extending it beyond its express terms.

The second argument Petitioners advance for why this Court should grant their petition is that the district court and the Eleventh Circuit improperly focused on the "search" aspect of the Fourth Amendment, instead of the "seizure" aspect. In other words, Petitioners attempt to make a distinction between limits placed on "places" that can be searched as opposed to "items" that can be seized. Again, there simply is no legal support for this distinction.

To illustrate their contention, Petitioners cite to *Oliver, supra*, wherein this Court held that "open fields" were not protected by the Fourth Amendment because,

among other things, there could be no expectation of privacy in the open field. Petitioners reasoned that it was improper for the district court to rely on *Oliver* because this was a "search" case that concerned an analysis of an expectation of privacy. (Petition for Writ of Certiorari at 10-11.) However, this Court also held that Fourth Amendment protection was inapplicable because "open fields" were not referred to in the text of the amendment, as discussed by Respondents *infra*. There is no "confusion" regarding the application of *Oliver* by lower courts, as Petitioners argue. Therefore, this issue cannot possibly constitute the "special and important" reasons required by this Court in granting an application for writ of certiorari.

No matter how much Petitioners stretch and strain, they cannot change the fact that this is nothing more than an eminent domain case. An entire body of law has now been built up by this Court in analyzing such claims, and it all comes from the Fifth Amendment. Why Petitioners chose not to assert a claim under the Fifth Amendment is a matter about which Respondents can only speculate. It is a matter, however, that need not trouble the Court.

Petitioners are simply trying to put a square peg in a round hole and, in doing so, claiming that this case is one of first impression. Saying it is does not make it so, however. Indeed, the fact that Petitioners eschewed the Fifth Amendment in pleading their case in favor of the Fourth does not make this a case of first impression any more than if Petitioners had attempted to claim their First Amendment rights were somehow involved. The Petition should be denied.

B. THE FIFTH AMENDMENT'S TAKINGS CLAUSE PROVIDES AN EXPLICIT CONSTITUTIONAL SOURCE FOR ANALYSIS OF PETITIONERS' CLAIM THAT THEIR REAL PROPERTY WAS NOT TAKEN FOR A PUBLIC PURPOSE

Petitioners' final argument to this Court is that it is an issue of first impression whether the Fourteenth Amendment's substantive due process clause applies in a case when the government allegedly takes private property for private, as opposed to public, use. This issue is certainly not one of "first impression," since it was definitively answered by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Plaintiff in *Dolan* was contesting the city's conditional approval of her application to expand her commercial property which required that she dedicate land for a greenway and for a pedestrian/bicycle pathway. *Id.* at 377-381. The majority of this Court specifically rejected the notion that such a controversy was grounded in the substantive due process clause. To the contrary, it adopted the view that such a claim was included within traditional takings clause analysis of the Fifth Amendment. *Id.* at 384 n.5. Indeed, this Court spent nearly ten (10) pages of its opinion determining whether the taking at issue had been for a legitimate public purpose, as required by the Fifth Amendment. *See also, Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984) (courts can invalidate compensated taking of property for lack of a justifying public purpose); *Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) (power of

eminent domain is fundamental and is circumscribed by "public use" requirement of the Fifth Amendment made applicable to the states through the Fourteenth Amendment).

To assert that the Fifth Amendment does not apply to a case in which it is alleged that there has been a governmental taking for an illegitimate public purpose is, at best, frivolous. There is no need for this Court to entertain Petitioners' appeal because the law is perfectly clear that Fifth Amendment analysis could have been used to address Plaintiffs' claims.

The rationale behind limiting a "takings" controversy to the explicit text of the Fifth Amendment is made clear by case law. Substantive due process protects those rights which are fundamental and protected "against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (internal quotation marks omitted). Areas in which substantive rights are created only by state law are not fundamental and do not qualify for substantive due process protection. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994). Therefore, "state law based rights constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed." *Id.*

It is well established that land use rights, as property rights, are state created rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *McKinney, supra.* As this Court stated, "the Constitution does not create property interests. Rather it extends various procedural

safeguards to certain interests 'that stem from an independent source such as state law.' " *Leis v. Flynt*, 439 U.S. 438, 441 (1979) (quoting *Board of Regents v. Roth, supra*).

Furthermore, this Court has indicated that when an explicit textual provision of the Constitution (i.e., the takings clause of the Fifth Amendment) protects against the area of governmental conduct challenged by plaintiffs, plaintiffs are precluded from obtaining relief under the generalized notion of substantive due process. *Albright v. Oliver*, 510 U.S. 266, 274-76 (1994). *See also, Bickerstaff Clay Prods. Co. v. Harris County, Ga.*, 89 F.3d 1481, 1490 (11th Cir. 1996) (plaintiff's substantive due process claim subsumed by its takings clause claim because Framers of Bill of Rights did not intend to replicate by implication the substantive rights of the Fifth Amendment into the due process clause of the Fourteenth Amendment).

In short, Petitioners' state law created property interest is protected, if at all, by the Fifth Amendment, and not by the substantive due process clause of the Fourteenth. The fact that Petitioners chose not to assert a Fifth Amendment claim does not change this result.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter because the justiciable concerns required by Rule 10 of the rules of this Court are absent. There is no need for this Court to proclaim or re-examine these issues because they have already been decided, albeit adversely

to Petitioners. An examination of the allegation of Petitioners' complaint and the applicable law is all that is needed. Petitioners' attempt to transform this case into something that it is not should be rejected.

The lower courts properly applied Fed. R. Civ. P. 12 in holding that Respondents were entitled to have Petitioners' claims dismissed as a matter of law. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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